2002

Fashion Place Associates v. Glad Rags, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

FASHION PLACE ASSOCIATES,	:	
	:	
Plaintiff and Respondent.	:	
	:	
vs.	:	
	:	
GLAD RAGS, INC.,	:	
	:	
Defendant and Appellant,	:	Civil No. 20514
	:	
vs.	:	
	:	

BRIEF OF APPELLANT

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IN THE SUPREME COURT

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FASHION PLACE ASSOCIATES, Plaintiff and Respondent. vs. GLAD RAGS, INC., Defendant and Appellant, vs.	Civil No. 20514

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

REFERENCES CITED

1. 49 Am. Jur. 2d Landlord & Tenant Section 622. 34

2. 8 C.J.S. Bailment Section 41(c). . . . 42, 43

3. 51 C.J.S. Landlord & Tenant Section 126(b) 30

4. 51 C.J.S. Landlord & Tenant Section 250(2)(f). 24

5. 52 C.J.S. Landlord & Tenant Section 493(2). 29

6. 52 C.J.S. Landlord & Tenant Section 498. 31

7. 9 Wright & Miller, Federal Practice and Procedure: Civil Section 2335, 2574 (1971). 46

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IN THE SUPREME COURT

OF THE STATE OF UTAH

FASHION PLACE ASSOCIATES, A Partnership,	:	
Plaintiff and Respondent:	:	
v.	:	
GLAD RAGS, INC.,	:	BRIEF OF APPELLANT
Defendant and Appellant.	:	Civil No. 20514

ISSUES PRESENTED ON APPEAL

1. Whether Tenant's departure from the premises, in light of the communication between Tenant and Landlord both prior to and subsequent to actual departure, constitues an abandonment under Utah Code Ann. Section 78-36-12.3 and 78-36-12.6.

2. Whether Landlord is entitled to recovery under the lease or common law where the reserved rental is exceeded by the fair market value of the premises and the rent received from the new lessee, and whether Landlord can be placed in a

better position than it would have been in had Tenant remained on the premises.

3. Whether Tenant's surrender of the demised premises and Landlord's taking possession, conducting Mall meetings, and storing other merchant's goods on the demised premises to the exclusion of the Tenant, constituted a surrender and an acceptance of surrender and a termination of the lease agreement as a matter of law.

4. Whether Landlord's attempts to relet the premises by quoting perspective lessees the rate of $15 to $20 per square foot and a $20,000.00 lump sum payment, when Tenant paid $8.50 per square foot, constituted a failure to appropriately mitigate damages and bars any recovery to the Landlord.

5. Whether the court's award of one half of the damages prayed for by Landlord was substantiated by the record, or whether the court awarded said damages without substantial evidence.

6. Whether Landlord, who agreed to allow items belonging to Tenant to be stored and remain in the demised premises, acted as bailee of those items, and whether Tenant is entitled to recover damages where Landlord failed to

return the property to Tenant and where Landlord has lost control and possession of said items.

7. Whether the trial court committed reversible error by failing to make Findings and Conclusions on the material issue of the security deposit.

8. Whether Glad Rags is entitled to recover attorney's fees under the terms of the lease agreement.

STATUTORY PROVISIONS DETERMINATIVE OF APPEAL

78-36-12.3 Definitions.

(3) "Abandonment" is presumed in either of the following situations:

(a) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent within 15 days after the due date, and there is no reasonable evidence other than the presence of the tenant's personal property that the tenant is occupying the premises; or

(b) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent when due and the tenant's personal property has been removed from the dwelling unit and there is no reasonable evidence that the tenant is occupying the premises.

78-36-12.6. Abandoned premises - retaking and rerenting by owner - liability of tenant - personal property of tenant left on premises. In the event of abandonment the owner may:

(1) Retake the premises and attempt to rent them at fair rental value and the tenant who abandoned the premises shall be liable:

(a) For the entire rent due for the remainder of the term;

(b) For rent accrued during the period necessary to re-rent the premises at a fair rental value, plus the difference between the fair rental value and the rent agreed to in the prior rental agreement, plus a reasonable commission for the renting of the premises and the costs, if any, necessary to restore the rental unit to its condition when rented by the tenant less normal wear and tear. This subsection shall apply, if less than subsection (a) notwithstanding that the owner did not re-rent the premises.

STATEMENT OF THE CASE

This is an action brought by the Landlord against the Tenant seeking recovery under the lease agreement for allegedly abandoning the premises. The Tenant defended on the grounds that it vacated in reliance on an agreement with Landlord, that Landlord failed to mitigate damages, that Landlord accepted a surrender of the premises, and that Landlord suffered no damages. Trial was held in the Third Judicial District Court before the Honorable David B. Dee who ruled that pursuant to Utah Code Ann. Section 78-36-12.3 Tenant abandoned the premises and Landlord is entitled to unpaid rent pursuant to 78-36-12.6.

STATEMENT OF FACTS

On or about June 10, 1974, the Tenant Glad Rags, Inc., (hereinafter designated as Glad Rags or Tenant), and

Landlord Fashion Place Associates, (hereinafter designated as Fashion Place or Landlord), entered into a written lease agreement for 1600 square feet of commercial space in the Fashion Place Mall for a 15 year term with rent at approximately $8.50 per square foot, or $1,133.33 per month. (Exhibit 1, R. 477). Ernest W. Hahn Corporation is a limited partnership which owns 81% of Fashion Place (R. 316) and owns approximately 35 malls (R. 323). The expiration date of said lease was December 31, 1989 (Exhibit 1, R. 458). During 1979 and 1981, Glad Rags signed three agreements with Fashion Place requiring Fashion Place to attempt to "sell" the demised premises, or find another lessee to take over the Glad Rags premises and/or leasehold improvements, thereby releasing Glad Rags from its Lease Agreement. (Exhibits 4, 5 and 6, R. 338, 339). None of the attempts of Fashion Place to "sell" the space were successful. (Exhibit 3, R. 376-377).

In the fall of 1981, Glad Rags' President and the Fashion Place Mall Manager met to discuss the possibility of terminating the lease and moving from the premises. (R. 331). During these meetings, Glad Rags indicated its intent to leave the premises at the end of 1981. (R. 365, 366,

379, 494, Exhibit 7). Glad Rags' President believed that the Mall Manager released Glad Rags from the lease (R. 496) and that this arrangement would work to the mutual benefit of both parties--the Mall would be able to increase its income by increasing the rent paid by new lessees, and Glad Rags would be able to close a moderately profitable location. (R. 492-94, 516). During those meetings, Glad Rags stated its intention not to purchase more clothing inventory for the Fashion Place store (R. 370-71) and no buying occurred (R. 504). Glad Rags vacated the premises on December 31, 1981. (R. 318). No rent has been paid since that time. (R. 318, 496).

Shortly after January 1, 1982, Glad Rags and Fashion Place had several meetings and conversations (R. 318, 386, 387, 452, 526), Glad Rags returned the key (R. 454), and the parties agreed to allow Glad Rags to store certain items on the premises pending 48 hours' notice to remove those items. (R. 388, 393-94, 451). Glad Rags intended that those stored items be offered for sale to the new lessee taking possession of the demised premises. (R. 511, 540). Glad Rags had a warehouse and adequate space to store these items itself (R. 512, 519) if an agreement could not have been

made with Fashion Place. Glad Rags testified that it never received notification from Fashion Place to remove said stored items. (R. 540). Fashion Place testified that such notification was given. (R. 451). The items left in the premises were never returned to Glad Rags (R. 551) and are no longer in the custody of Fashion Place. (R. 488).

After Glad Rags' departure, Fashion Place attempted to relet the demised premises. (R. 318). Fashion Place quoted lease rates to prospective tenants of $15 to $20 per square foot annually (R. 362, 365, 508) plus a lump sum payment of $20,000. (R. 344, 411, 412). Fashion Place's Mall Manager testified that during the period of vacancy, the space was impossible to sell because of the economic conditions. (R. 382-383).

During the period prior to releasing the demised premises, Fashion Place utilized the premises for its own purposes and benefit by holding several meetings of the Fashion Place Mall Merchant Association (R. 482-83) and storing items belonging to other Mall tenants in the demised premises for a period of six weeks (R. 447).

Another woman's clothing store, the Chalk Garden, presented a written offer to Fashion Place to lease the

demised premises with rent beginning at approximately $8 per square foot and escalating to $14 per square foot. (R. 412.) This store would have met the tenant mix requirements of Fashion Place. (R. 333). Fashion Place neither responded to nor rejected the Chalk Garden offer. (R. 412, 413).

On or about April 1, 1983, after 15 months of vacancy, Fashion Place leased the demised premises to two separate stores, Fleet Foot and Life Uniforms. (R. 391, 320). Fleet Foot agreed to pay $30 per square foot for a five year term which expires on approximately April 1, 1988. (R. 466-68). Life Uniforms signed a seven year lease with rent beginning at $10 per square foot annually and escalating to $14 per square foot over the term. (R. 462). Life Uniforms' seven year lease extends past the December 31, 1990 expiration date of Glad Rags' lease. (R. 471).

Under the terms of Glad Rags' lease, Fashion Place received $1,133.33 in monthly rental payments or $13,600 annually. (R. 458). Fashion Place alleged a rent arrearage of $24,467.87 when the premises were relet. (R. 322). The base rent Fashion Place receives from Fleet Foot and Life Uniforms on the demised premises is at least $2,606.67 per

month. (R. 478). This amounts to an increase in monthly income to Fashion Place of $1,472.33 (R. 478). The rent for the 15 month period of vacancy was satisfied by the new tenants in approximately 17 months, or two months prior to the date of the trial. (R. 478-479).

From the time Glad Rags vacated the premises, December 31, 1981, to the date of the expiration of the lease, December 31, 1989, Fashion Place would have received $108,800 from Glad Rags. (R. 460-61). Under the new leases with Fleet Foot and Life Uniforms, Fashion Place will receive approximately $116,400 from Fleet Foot (R. 468) and $48,000 from Life Uniforms (R. 471) for a total of at least $164,400 for the same period. In addition to this amount, Fashion Place will receive additional income from the escalating Life Uniforms' lease (R. 470) and 1 1/2 years of additional rent from the premises leased to Fleet Foot, whose lease expires in April, 1988. (R. 471-472). The reasonable rental rate value for the demised premises on December 31, 1981 was $15 to $20 per square foot annually or $192,000 over the eight year lease term (R. 476-77).

SUMMARY OF ARGUMENT

ISSUE 1. As a matter of law, Glad Rags' departure from the demised premises does not constitute an abandonment under Utah Code Ann. Section 78-36-12.3 because Glad Rags notified Fashion Place that it intended to vacate the premises and had several communications with Fashion Place immediately after its departure. As a result, the damages set forth in 78-36-12.6 are not available to Fashion Place.

ISSUE 2. Fashion Place is not entitled to any recovery from Glad Rags under the terms of the lease or common law because it will receive substantially more rental income over the lease term from the new lessees than it would have received from Glad Rags. Because Fashion Place has suffered no actual damages, it is not entitled to be put in a better position than if Glad Rags had remained on the premises.

ISSUE 3. Glad Rags' action of departing from the demised premises constituted a surrender to Fashion Place, and Fashion Place's actions in taking possession, conducting Mall meetings, and storing other merchant's goods on the demised premises constituted an acceptance of Glad Rags' surrender and terminated the lease as a matter of law.

ISSUE 4. Fashion Place failed to mitigate its damages and failed to re-let the premises by quoting perspective

lessees the rate of $15 to $20 per square foot annually, almost twice Glad Rags' reserved rental rate, and by requiring an additional $20,000 payment before a perspective lessee could occupy the premises. Fashion Place also failed to mitigate by failing to accept a written proposal from another woman's clothing store to occupy the demised premises at a higher rent over the term.

ISSUE 5. The trial court's award of 1/2 of the damages prayed for by Fashion Place is not substantiated by any evidence in the record and cannot be sustained.

ISSUE 6. Fashion Place acted as bailee of the items it allowed to be left in the demised premises by Glad Rags, and breached its duty as bailee when it failed to take reasonable steps to return the bailed items and notify Glad Rags of its intent to terminate the bailment agreement. Fashion Place also breached the bailment agreement when it lost control of the bailed items and no longer has them in its possession.

ISSUE 7. Glad Rags' Counterclaim demanding return of its security deposit was not addressed in the Findings and Conclusions, and this failure to rule on a material issue constitutes reversible error.

ISSUE 8. Under the lease agreement, Glad Rags is entitled to recover attorney's fees if it is the prevailing party in this action.

ARGUMENT

ISSUE 1.

GLAD RAGS' DEPARTURE FROM FASHION PLACE DOES NOT CONSTITUTE ABANDONMENT UNDER UTAH CODE ANN. SECTION 78-36-12.3 OR 78-36-12.6.

Uncontradicted evidence in the record indicates that Glad Rags met with Fashion Place prior to December 31, 1981 and expressed its intend to vacate the premises on that date. The parties had several communications and meetings (R. 318) subsequent to Glad Rags' departure concerning the property (R.386), and the items retained on the premises (R. 388). Glad Rags paid no rent to Fashion Place on the demised premises after December 31, 1981 (R. 318, 496).

Fashion Place claims that these facts constitute an abandonment under Utah Code Section 78-36-12.3 and 78-36-12.6. These sections state:

78-36-12.3 Definitions.

(3) "Abandonment" is presumed in either of the following situations:

(a) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent within 15 days after the due date, and there is no reasonable

evidence other than the presence of the tenant's personal property that the tenant is occupying the premises; or

(b) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent when due and the tenant's personal property has been removed from the dwelling unit and there is no reasonable evidence that the tenant is occupying the premises.

78-36-12.6. Abandoned premises - retaking and rerenting by owner - liability of tenant - personal property of tenant left on premises. In the event of abandonment the owner may:

(1) Retake the premises and attempt to rent them at fair rental value and the tenant who abandoned the premises shall be liable:

(a) For the entire rent due for the remainder of the term;

(b) For rent accrued during the period necessary to re-rent the premises at a fair rental value, plus the difference between the fair rental value and the rent agreed to in the prior rental agreement, plus a reasonable commission for the renting of the premises and the costs, if any, necessary to restore the rental unit to its condition when rented by the tenant less normal wear and tear. This subsection shall apply, if less than subsection (a) notwithstanding that the owner did not re-rent the premises.

For abandonment to be presumed, the factual requirements of 78-36-12.3(3) must be met. The presumption of abandonment, if established, is not conclusive, but is rebuttable. Concerning presumptions, the Utah Supreme Court

in Hoffman v. Life Insurance Co. of North America, 669 P.2d 410, 420 (Utah 1983) stated:

> . . .Although the law frequently employs the proposition that one intends the natural probable results of his conduct in tort and criminal law, as well as other areas of the law, a rule based on that proposition is generally only a rule of evidence giving rise to an inference, not a conclusive presumption or a shift in the burden of proof. Sanstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed.2d 39 (1979).

A presumption of abandonment is therefore only evidence giving rise to an inference of abandonment, not a conclusive presumption or a shift in the burden of proof. The burden of proof of establishing an abandonment under Utah Code Ann. Section 78-36-12.3 has not been met because Fashion Place failed to establish that the facts in this case meet the criteria set forth in subsections (a) and (b) of 78-36-12.3.

Subsection (a) and (b) factually require that no notice has been given to the owner that the tenant will be absent from the premises. The uncontraverted evidence establishes that Fashion Place had notice that Glad Rags would vacate the premises (R. 365). In addition, immediately after Glad Rags vacated the premises several more meetings and conversations between the parties took place (R. 318), wherein the parties discussed the return of the security

deposit (R. 386) and leaving items of personal property on the premise for storage or for sale to the subsequent lessee. (R. 318, 386, 387, 452, 526-527).

Abandonment under Utah Code Ann. Section 78-36-12.3(3) must be interpreted according to the designated definition to avoid nonsensical and absurd results. Millett v. Clark Clinic Corp., 609 P.2d 934 (Utah 1980). In Cannon v. McDonald, 615 P.2d 1268, 1270 (Utah 1980), the Utah Supreme Court stated:

> In interpreting the statutory language care must be taken to construe the words in light of the total context of the legislation, and when the construction of a section involves technical words and phrases which are defined by statute, the provision must be construed according to such peculiar and appropriate meaning or definition.

The sections defining abandonment are not applicable to the facts in this matter because of the notice to Fashion Place and the continuing communication between the parties. A finding of abandonment circumvents the intent of the legislature and leads to the nonsensical and absurd result of eliminating the "notification to owner" requirements from Section 78-36-12.3 and awarding recovery to an uninjured party.

In situations where the meaning of a statute is uncertain, it is proper to consider the practical aspects of its operation in order to determine the legislative intent. State v. Salt Lake City Public Board of Education, 13 Utah 2d 56, 368 P.2d 468 (1962). If the interpretation of a statute leads to incongruous results, it should not be so applied.

> . . .But statutes of necessity must state their objectives in general language. It is not always possible to foresee and prescribe in precise detail for all situations to which they might apply. Attempts to give them universal and literal application frequently lead to incongruous results which were never intended. When it is obvious that this is so, the statute should not be so applied. In order to give a statute its true meaning and significance it should be considered in the light of its background and the purpose sought to be accomplished, together with other aspects of the law which have a bearing on the problem involved.

Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915, 916 (1964). The abandonment statute was never intended to go beyond the specific facts presented in the definition. To ignore the factual requirements would give the statute a more universal application than intended and lead to the incongruous result of granting damages to an uninjured party. Fashion Place will almost double its return on the demised premises over

the term of the lease. To grant unpaid rent to Fashion Place constitutes a windfall which was never contemplated or intended under this statute.

The abandonment statute is intended to give a remedy to the landlord whose tenant disappears or is not in contact with the landlord concerning the leasehold. Under the old Utah law, in order for a landlord to be completely safe in taking possession of leased premises, the landlord had to file action for eviction or for unlawful detainer. If the tenant could not be found, the Plaintiff had to publish a summons and complaint which took long periods of time to complete and subjected the landlord to claims of forcible entry and detainer if he repossessed or relet the property to mitigate damages. To remedy this cumbersome process and to adequately protect the landlord, the legislature passed Sections 78-36-12.3 and 78-36-12.6.

In finding that Glad Rags had "abandoned" the premises the trial court misapplied the law. The standard of review on appeal where the law has been misapplied is set forth by the Utah Supreme Court as follows:

> The standard for appellate review of factual findings affords great deference to the trial court's view of the evidence unless the trial court has misapplied the law or its findings are

> clearly against the weight of the evidence. Pagano v. Walker, Utah, 539 P.2d 452 (1975); Reed v. Alvey, Utah, 610 P.2d 1374 (1980).

Garcia v. Schwendiman, 645 P.2d 651, 653 (Utah 1982). See also, Ute Cal Land Development v. Intermountain Stock Exchange, 628 P.2d 1278 (Utah 1981).

It is clear from the terms and intent of the statute that the facts and circumstances surrounding the departure of Glad Rags from the demised premises does not constitute an "abandonment". Glad Rags did not "abandon" the premises because the uncontroverted facts establish that it notified Fashion Place of its intent to depart (R. 365). Several meetings and conversations between the parties occurred immediately after Glad Rags departed (R. 387). The abandonment statute was intended for situations distinct from the case at bar. Fashion Place is therefore not entitled to recovery from Glad Rags under this statute and the Findings and Conclusions must be reversed as a matter of law.

ISSUE 2

FASHION PLACE IS NOT ENTITLED TO COLLECT UNPAID RENT UNDER THE LEASE AGREEMENT OR COMMON LAW AND IS ONLY ENTITLED TO BE PLACED IN AS GOOD A POSITION AS IF GLAD RAGS HAD NOT DEPARTED FROM FASHION PLACE MALL.

The record indicates that under the terms of Glad Rags'

lease, Fashion Place would receive $1,133.33 per month in lease payments (R. 477). The base rent Fashion Place receives from the Fleet Foot and Life Uniforms on the demised premises is at least $2,606.67 per month or a difference of $1,473.34 per month above the Glad Rags rent (R. 478). The rent arrearage due to Fashion Place under the Glad Rags lease for 15 months of vacancy, claimed to be $24,467.87 (R. 478), was satisfied within a period of 17 months (R. 478), or two months prior to the trial, by the increased rental payments from Fleet Foot and Life Uniforms (24,467.87 unpaid rent divided by 1,473.34, the payments in excess of Glad Rags' rent each month = 16.61 months to satisfy the arrearage.) (R. 477-479). Over the entire term of the Glad Rags lease, Fashion Place Mall would have received $108,800 in rent from Glad Rags (R. 460). Over the same period, and with the existing leases of Fleet Foot and Life Uniforms, Fashion Place will receive at least $164,400 (R. 474), not including additional rental income available from the escalating Life Uniforms lease (R. 462) and the rerental of the Fleet Foot space after Fleet Foot's lease expires in April, 1988, approximately 1 1/2 years before the expiration of the Glad Rags lease (R. 468).

RENT PAYMENTS

	Per foot	Month	Annual	Total to 12/31/1989
Glad Rags	$8.50	($1,133.33)	($13,600.00)	($108,800.00)
Fleet Foot	30.00	1,940.00	23,280.00	116,400.00[2]
Life Uniforms	10.00	666.66	8,000.00	48,000.00[3]
Excess to Fashion Place above Glad Rags Lease		1,472.33	17,680.00	52,200.00
Fair Market Value	15.00[1]	2,000.00	24,000.00	192,000.00

1. Fair market value established as $15 to $20 per square foot annually.

2. Fleet Foot's lease term is five years, expiring April 1, 1988. Fashion Place will be able to lease this space from April 1, 1988 through December 31, 1989 and receive additional rents not included above.

3. Life Uniform's lease extends beyond the December 31, 1989 term. This figure represents only the income payable to Fashion Place during the term.

(Record p. 459-481).

The lease provides for two methods of determining the damages to which Fashion Place may be entitled: the difference between the reasonable rental value of the demised premises and the reserved rent; and the difference between the rent reserved in the lease and the rental income

after the premises have been relet. (See Appendix I). The common law rule states that the landlord's damages are measured by the difference between the fair market rental and the reserved rent amount under the lease. This is the same test provided in the lease.

Paragraph (a) of the lease agreement allows the landlord to immediately declare the term ended and re-enter the premises, thus terminating the tenant's lease. Paragraph (c) also deals with termination, but allows the landlord to relet the premises and thereafter elect to terminate the lease. The provisions of the lease detailing the landlord's recovery combines subparagraphs (a) and (c) into one formula as follows:

> Should the Landlord elect to terminate this Lease under the provisions of subparagraphs (a) or (c) above, the Landlord shall thereupon, without waiting for the end of the term hereof, be entitled to recover from the Tenant as damages the difference, if any, between the then reasonable rental value of the premises for the period of the term reserved in the Lease and the amount of rental and other charges payable by the Tenant for the balance of the term of this Lease, together with the rent then unpaid if any.

Fashion Place Lease, Article 22, page 23 (Exhibit 1).

This provision incorporates the common law theory of recovery into the lease agreement. The reasonable rental

value was established at $15 to $20 per square foot annually for a total of at least $192,000 over the term (R. 476-477). The reserved rent was $8.50 per square foot, or $108,000 over the term (R. 460-61). Because the fair market value exceeds the reserved rent, no recovery is available to Fashion Place under this lease provision or the common law.

Subparagraph (b) of the lease allows Fashion Place to reenter the premises and re-lease the premises on behalf of Glad Rags for any terms which shall be deemed proper by the landlord. The landlord shall then:

> . . .collect said rent and any other rent that may thereafter become payable and apply the same towards the amount due or thereafter to become due from the tenant and on account of such expenses of such reletting and other damages sustained by the landlord;

Fashion Place Lease, Article 22, page 22 (Exhibit 1).

Under this provision, the rent collected from the new lessees must be applied towards the amount due or thereafter to become due from Glad Rags. The rent received by Fashion Place from the new lessees in the demised premises exceeds Glad Rags' lease payment and was sufficient to make up the outstanding balance of rent not received during the period

of vacancy. Therefore, under this provision of the lease, Fashion Place is not eligible to recover damages.

Although there are no Findings and Conclusions by the trial court on damages under the lease, the written lease agreement need not be remanded to the trial court for interpretation and findings.

> . . .In interpreting the contract in question, this court deals with a question of law. As such, the same deference need not be accorded the lower court's position as we would accord findings of fact. See Polk v. Koerner, 111 Ariz. 493, 533 P.2d 660 (1975); Rooney v. Vermont Inv. Corp., 10 Cal. 3d 351, 110 Cal. Rptr. 353, 515 P.2d 297 (1973).

Provo City Corp. v. Nielson Scott Co., 603 P.2d 803, 805 (1979). See also, O'Hara v. Hall, 628 P.2d 1289 (Utah 1981); Arnold Machinery Co. v. Balls, 624 P.2d 678 (Utah 1981).

Under the common law theory of recovery, the U. S. Court of Appeals, ruling on a case arising in the District Court of Utah, stated:

> . . . like the trial court and the parties, our search has not uncovered any Utah case prescribing a formula for the ascertainment of damages resulting from an anticipatory breach, or premature termination, of a lease or rental contract. We agree, therefore, with the trial court that the general rule is to the affect that the tenant's damage is measured by the difference

> between the present value of the reserved rent and the present fair rental value of the remainder, the two of which are presumed to be the same. . .. [citations omitted.] In other words, it is presumed that in the event of a breach, that the lessor will be able to re-rent the leased premises for the amount of the reserved rent without loss or damage. But, this presumption, as all other presumptions in law and fact, may be disputed or rebutted by competent and relevant facts.

C. D. Stimson Co. v. Porter, 195 F.2d 410, 413 (10 Cir. 1952). See also, Gordon v. Consolidated Sun Ray, Inc., 195 Kan. 341, 404 P.2d 949 (1965); Jones v. McQuesten, 172 Wash. 480, 20 P.2d 838, 840 (1933).

A similar definition is found in 51 C.J.S., Landlord and Tenant, Section 250(2)(f):

> Wrongful Abandonment or Surrender of Premises. If the lessee wrongfully abandons or surrenders the leased premises, he is liable for the damages actually sustained by the lessor, although the lease contains no provision as to the amount of damages for the breach. The measure of damages in such a case has been held the difference between the agreed rent for the balance of the term and the actual or fair rental value of the premises, at the time of the breach; or where the lessor, by the exercise of reasonable efforts, has relet the premises, the measure of damages is the difference between the rent stipulated in the lease and the sum received from the other persons for the remainder of the term;. . . [emphasis added].

This legal authority establishes a presumption that the lessor will be able to re-rent the premises for at least the

amount of the reserved rent, and therefore sustain no loss or damage. Fashion Place has failed to adequately rebut this presumption, and has, in fact, substantiated the terms of the presumption by renting the premises in excess of the reasonable rental value. The reasonable rental value of $15 to $20 per square foot annually (R. 476-477) exceeded the amount of rent reserved under the lease, and it is therefore presumed that the Plaintiff suffered no damages and is not entitled to recovery.

Fashion Place is not entitled to be placed in a better position than it would have been in had Glad Rags not vacated the demised premises. The Utah Supreme Court has stated:

> The assessment of damages by the trial court was consistent with the general principal which underlies the ascertainment of damages for breach of contract: That the non-breaching party should receive an award which would put him in as good a position as he would have been in had there been no breach.

Keller v. Deseret Mortuary Co., 23 Utah 2d 1, 455 P.2d 197, 198 (1969). See also, Clayton v. Crossroads Equipment Co., 655 P.2d 1125 (Utah 1982).

The Utah Supreme Court also stated:

> Damages are properly measured by the amount necessary to place the non-breaching party in as

> good a position as if the contract had been performed.

Alexander v. Brown, 646 P.2d 692 (Utah 1982). See also, Utah Farm Production Credit Association v. Cox, 627 P.2d 62 (Utah 1981); Miller Pontiac, Inc. v. Osborne, 622 P.2d 800 (Utah 1981).

This same principal has been defined in detail concerning the breach of a lease:

> Generally, a Plaintiff suffering injury is entitled only to a cause of action for damages actually sustained. . . .
>
> > "(I)t seems to be the rule of general application, that in all actions on contract, sounding in damages . . . the Plaintiff is entitled to recover damages only to the extent of the injury sustained. If circumstances exist which mitigate the injury, they must be considered in measuring the damages."
>
> This general rule would also control determination of the measure of damages normally to be applied in cases of breach of a lease agreement. This measure of "actual loss" has been set forth in numerous cases which indicate that damages for breach of contract are compensatory in nature, in restitution for the harm caused, and should only make the injured party whole again, or in the position he would have been in had the contract been performed, and not in a better position than if there had been performance. [citations ommitted.]
>
> . . .
>
> On the basis of this principal, the landlord would be entitled to recover only his actual losses and the excess rent received by [Plaintiff]

> because of the breach and abandonment by [Defendant] would be applied to the credit of [Defendant] to the extent of damages owed by [Defendant] to [Plaintiff].
>
> . . .
>
> "The rent due from the original lessee is to be credited with such rent as is realized from the re-letting. The lessor is entitled to such sum as shall be equal to the rents required by the terms of the lease to be paid during the full term, and not any greater sum." (Emphasis added).
>
> There appears to be general agreement that the lessee who breaches a lease is entitled to a rent credit for any proceeds gained by the landlord from reletting during the period of the original lease term.

Wanderer v. Plainsfield Carton Corp., 40 Ill. App. 3d 552, 351 N.E.2d 630, 635 (1976).

Fashion Place is not entitled to recover any unpaid rent in this matter. The existing leases with Fleet Foot and Life Uniforms have totally compensated Fashion Place for the time the space was vacant prior to the trial (R. 478). Fashion Place has suffered no actual loss, cannot recover under the lease or common law, and is not entitled to be placed in a letter position than it would have been in had Glad Rags remained on the premises by receiving unpaid rent in addition to the increased rental.

ISSUE 3

FASHION PLACE ACCEPTED THE SURRENDER OF GLAD RAGS PREMISES AS A MATTER OF LAW.

After Glad Rags vacated the demised premises, Fashion Place utilized the premises for its own benefit and for its own purposes. Uncontradicted testimony indicates that the Mall held several meetings of the Fashion Place Mall Merchant Association in the demised premises (R. 482), and that chairs and other fixtures were utilized in the premises for the purpose of conducting these meetings. (R. 542). Fashion Place allowed other individuals to store fixtures and goods in the premises to the exclusion of Glad Rags and with no monetary compensation or benefit to Glad Rags (R. 447, 483). In addition, Fashion Place leased a portion of the property to Life Uniforms for a term which extends past the original term of Glad Rags (R. 471).

The Utah Supreme Court has defined and accepted the doctrine of surrender in Belanger v. Rice, 2 Utah 2d 250, 272 P.2d 173 (1954). The court stated:

> A surrender may take place where there is an express agreement of the parties or by operation of law. . . As stated in 32 Am. Jur., Landlord & Tenant, Section 905:
>
> > "A surrender of the lease by operation of law results from any acts which imply mutual consent independently of the express intention of the parties

> that their acts shall have that effect; it is by way of estoppel. However, the intention of the landlord to accept the tenant's surrender of the premises is important on the question of surrender by operation of law, and a surrender will not be implied against the intent of the parties, as manifest by their acts; . . .."

A surrender as a matter of law may therefore result from acts which imply a mutual consent to terminate a lease independent of the express intention of the parties. Id. On the question of intent implied from ones acts the U t a h Utah Supreme Court has also stated:

> It is only when he [the landlord] exercises dominion over the premises beyond those purposes and inconsistent with the rights of a tenant whom he seeks to hold for the rental of the premises, that a finding of surrender is justified. John C. Cutler Association v. De Jay Stores, 3 Utah 2d. 107, 279 P.2d 700, 702 (1955). An acceptance of the landlord will be implied where he takes possession of the premises and uses them for his own purpose.

Id. at 174. See also 52 C.J.S. Landlord & Tenant, Section 493(b)(2).

The inconsistent uses of the demised premises by Fashion Place are uncontroverted by the record. The fact that these inconsistent uses took place establishes a

rebuttable presumption that the landlord has accepted the surrender of the leased premises.

> . . .It has been held that an agreement may be inferred from objective acts of the lessor and lessee, and that a rebuttable presumption of acceptance arises on proof of the landlord's reentry and resumption of the beneficial use of the leased premises, or reletting thereof.

51C C.J.S. Landlord & Tenant, Section 126(b), page 408. No testimony or evidence in the record was presented to sufficiently rebut this presumption. Fashion Place must therefore be held to have accepted Glad Rags' surrender of the premises and no damages are available in this action because surrender releases the tenant's obligaton to pay rent. John C. Cutler Association v. De Jay Stores, 3 Utah 2d 107, 279 P.2d 700 (1955); Willis v. Kronendonk, 58 Utah 592, 200 P. 1025, 1028 (1921). See also, Roosen v. Schaffer, 127 Ariz. 346, 621 P.2d 33 (1980).

The North Dakota Supreme Court held that the storage of fixtures alone in the demised premises constitues an acceptance of the surrendered premises:

> In light of the use of the leased premises by the [plaintiffs] to store their fixtures, we conclude that the district court was correct in finding that the surrender of the leased premises

> was accepted by the [plaintiffs] through their continuing use of the property to their benefit.

Sandon v. Hansen, 201 N.W.2d. 404, 410 (N.D. 1972). See also, John C. Cutler Associates v. De Jay Stores, 3 Utah 2d 107, 279 P.2d 700 (1955).

The lease to Life Uniforms for a term which extends past the original lease term of Glad Rags indicates that Fashion Place intended to accept the surrender of the premises by Glad Rags. In 52 C.J.S. Landlord & Tenant, Section 498(b)(2), it states:

> . . .it has been held that a reletting for a period beyond the original term operates as an acceptance of a surrender releasing the tenant from liability for any deficiency, although it has been stated that such reletting is not conclusive, but merely some evidence of surrender and acceptance.

In Willis v. Kronendock, 58 Utah 592, 200 P.1025, 1030 (1921), the Utah Supreme Court stated:

> . . .Where a tenant abandons the premises, and the landlord unconditionally goes into possession thereof and treats them as though the tenancy had expired, it amounts to a surrender, and the landlord cannot thereafter recover any rent, nor sue for damages. If he desires to reserve that right, he must recognize the tenant's rights in the premises for the unexpired term, and sue him for damages upon his breach of covenant to pay rent. This, however, is elementary doctrine.

See also Belanger v. Rice, 2 Utah 2d 250, 272 P.2d 173 (1954).

The Utah Supreme Court followed the surrender doctrine in an action similar to the case at bar, John C. Cutler Association v. De Jay Stores, 3 Utah 2d 107, 279 P.2d 700 (1955). In this case, the landlord/Plaintiff, filed action against the tenant/Defendant for unpaid rent after Defendant vacated the premises. The court found that the landlord had allowed the premises to be utilized without compensation for the storage of furniture items owned by another business. In addition, the premises were leased to a political organization for a brief period. The Utah court stated:

> . . .Unlike the other acts of the lessor Cutler as hereinabove recited, this action [to allow the storage of furniture on the premises without charge] may well have been regarded by the trial court as an exercise of dominion over the premises to the exclusion of the tenant; that it was used to comport with the desires of the lessor for his own benefit, and inconsistent with recognition of the rights of the tenant whom he now seeks to hold for the rental.

Id. at 703. On this basis, the Utah Supreme Court affirmed the findings of the trial court that a surrender and acceptance had occurred as a result of the storage of

furniture on the premises and the lease to a political organization.

The acts of Fashion Place in relation to the demised premises establishes its acceptance of the surrender from Glad Rags. The acceptance of the surrender terminates any obligation of Glad Rags to pay ongoing lease payments to Fashion Place and the lower court's decision awarding such payments must be reversed.

ISSUE 4.
FASHION PLACE FAILED TO MITIGATE ITS DAMAGES AND IS THEREFORE NOT ENTITLED TO RECOVER DAMAGES FROM DEFENDANT IN THIS ACTION.

A basic element of contract law requires the damaged party to mitigate its damages resulting from a breach of contract. Assuming for the sake of argument, without admitting, that Glad Rags breached the contract, Fashion Place has the obligation to make a good faith effort to mitigate damages.

The record indicates that after Glad Rags vacated the demised premises, Fashion Place contacted perspective tenants and quoted them rental figures of $15 to $20 per square foot annually (R. 362, 508). The Mall manager testified that he was instructed by Fashion Place to quote

these figures (R. 363). In addition to virtually doubling the rent, Fashion Place requested a lump sum payment of $20,000 from perspective tenants (R. 344, 411). Fashion Place also failed to mitigate its damages when it failed to accept a written offer from the Chalk Garden, another woman's retail clothing store which offered to pay rent at approximately $8 per square foot initially and escalating to $14 per square foot annually (R. 412).

The Utah Supreme Court has recognized the doctrine of mitigation of damages in landlord and tenant situations where the tenant vacated the demised premises. Meyer v. Evans, 16 Utah 2d 56, 395 P.2d 727 (1964); University Club v. Invescto Holding Corporation, 29 Utah 2d 1, 504 P.2d 29 (1972).

The landlord's duty to mitigate damages in light of his attempt to substantially increase the rent was discussed 49 Am. Jur. 2d Landlord & Tenant, Section 622:

> . . .where, upon a contemplated rerenting of the premises, the landlord insisted on an agreement which would have been at variance with the terms under which the premises had originally been rented, it has been held that such conduct, alone or in combination with other circumstances, showed a breach of the landlord's duty to mitigate damages.

The North Dakota Supreme Court has similarly stated:

> The findings of the trial court indicate that the very substantial increase in the rent could not be considered a good faith effort to mitigate damages. [Plaintiff] argues that it is improper to reach this conclusion simply because the property was listed for rent at the higher figure. If seeking a higher rent inhibits the rerental of the premises, it cannot be found to be in good faith. There was testimony that showed that the higher rent figure was firm and did deter the rerental. It was thus not clearly erroneous for the trial court to find that the failure to obtain a new tenant was due in part to an increase in rental.
>
> Several cases from other jurisdictions indicate that an increase in sought-after rental may violate the landlord's duty to mitigate damages and presents a question of fact. [Citations ommited.] The trial court properly used the evidence of the listing agreement as showing an intention on the part of the landlord to seek a higher rent. The court thereupon determined that this intention ended the landlord's previous good faith efforts to minimize damages. . . .
>
> . . .
>
> The duty to minimize damages is met by a "good faith effort to mitigate damages". In absence of any assertion or showing to the contrary, the good faith of the [plaintiff] will be presumed. The burden of showing a lack of good faith effort on the part of [plaintiff] is necessarily upon [defendant].

Mar-Son, Inc. v. Terwaho Enterprises, Inc., 259 N.W.2d 289, 292-293 (N.D. 1977).

The record clearly indicates that the rental price quoted to perspective lessees was at substantial variance

with the terms of the original lease by increasing the rent from $8.50 per square foot annually to approximately $15 to $20 per square foot. This conduct alone establishes a breach of Fashion Place's duty to utilize good faith efforts to mitigate the damages. Fashion Place's desire to obtain high rents inhibited perspective tenants from leasing the property and contributed to the property's vacancy for a period in excess of 15 months. In addition, Fashion Place's request for a $20,000 payment from perspective tenants is clearly not a good faith effort to mitigate and must be presumed to have inhibited the rental of said property.

Fashion Place also failed to mitigate its damages by failing to accept the written lease offer from the Chalk Garden, another women's clothing store. The Chalk Garden initially offered to pay $8 per square foot for the demised premises. This figure would have escalated to $14 per square foot (R. 412). Such a lease, although initially falling 50 cents per square foot short of Glad Rags' lease rate, would have been a financial advantage to Fashion Place by increasing the return on the demised premises over the term of the Glad Rags lease, and would have mitigated the damages of the parties. Fashion Place's failure to accept

said offer from the Chalk Garden constitutes a breach of the landlord's duty to mitigate damages.

> . . .When [tenants] abandon their lease and turned the premises over to Samuel Shoe Co., [a new lessee] that company was able, ready, and willing to assume all the obligations of [tenants] under the lease and to continue to occupy the premises. Had [landlord] accepted this company as a tenant they would not have been damaged in the least. What the motive of [landlord] was that prompted them to reject the Samuel Shoe Co. as a tenant is not material. Attention is called to the following language in Wilson v. Refining Co., [126 Kan. 139, 266 P. 941, 943] supra:
>
> > "Where a party seeks redress for the wrong of another, the law requires that he do whatever he reasonably can, and improve all reasonable opportunities to avoid the consequences and to lessen the injury."
>
> The record here is clear that reasonable action on the part of [landlord] would have prompted them to have accepted the Samuel Shoe Co. as a tenant.

Marmont v. Axe, 135 Kan. 368, 10 P.2d 826, 827 (1932). Fashion Place breached its duty to mitigate damages by failing to accept the Chalk Garden offer. The Chalk Garden would have met the tenant mix required by Fashion Place (R. 333) and the rent recoverable from the Chalk Garden would have substantially exceeded the rent payable by Glad Rags.

These two breaches of Fashion Place's duty to mitigate the damages renders Fashion Place ineligible to recover damages for unpaid rent from Glad Rags.

ISSUE 5.

THE TRIAL COURT'S AWARD OF HALF DAMAGES IS UNSUBSTANTIATED BY THE RECORD AND MUST BE OVERTURNED ON APPEAL.

The only evidence in the record concerning the damages suffered by Fashion Place is the testimony of the Mall Manager, Robert Garwood. He testified that because the premises were vacant for 15 months, at the normal rental rate during that period, the outstanding balance due to Fashion Place from Glad Rags on the ongoing lease was $24,467.87 (R. 322). In the Findings and Conclusions drafted by Fashion Place's attorney, it indicates that the Court found that the lease arrearages amounted to $24,467.87. The Findings and Conclusions make no reference to any other damages or a mitigation of damages (R. 279-284). The judgment of $12,233.00, is exactly half of the amount prayed by Fashion Place (R. 277-278). There is no testimony or evidence that half of the amount prayed for by Fashion Place has any relation to compensible damage.

Where the Findings of Fact and Conclusions of Law are not substantiated by competent evidence in the record, the Supreme Court is obligated to overturn them. In Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620, 626 (Utah 1979), the court stated:

> Generally, it is the perogative of the trial court to determine the facts and we affirm when the determination thereof is supported by substantial evidence. However, when a finding is so plainly unreasonable that no trier of fact could fairly make such a finding, it cannot be said to be supported by substantial evidence and the finding will be rejected as a matter of law, and the fact determined otherwise.

As a further statement of the standard of review on appeal, the Utah Supreme Court stated in Supertire Marketing, Inc. v. Rollins, 18 Utah 2d 122, 417 P.2d 132, 135 (1966):

> . . .we note our agreement with the contention that in spite of the often declared broad perogative possessed by the trier of fact in judging the credibilty of witnesses in determining the facts, it is not entirely without limit. One of the most salutary features of our system of government is that throughout its entire structure there are checks and balances against the exercise of despotic power or unreasoning action by any official or functionary. It is the duty of the courts to safeguard these protections; and they themselves should not be exempted from this principal. This is the basis for the right of review on appeal whereby a court or jury may be prevented from obdurately refusing to accept credible uncontradicted evidence without any

> rational basis for doing so. The Defendant's challenge poses the question whether the trial court was guilty of such a transgression here. [Emphasis added.]

See also, Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977); First Western Fidelity v. Gibbons & Reed Co., 27 Utah 2d 1, 492 P.2d 132 (1971).

In addition to this basic standard of review on appeal requiring that the Findings of Fact be justified by substantial evidence in the record, the Utah Supreme Court has stated specifically concerning damages:

> The determination of the trial court on damages will not be reversed if it is supported by substantial evidence in the record. We will, however, reverse the trial court if there is a misapplication of the law to the established facts. Hardy v. Hendrickson, 27 Utah 2d 251, 495 P.2d 28 (1972).

Bitzes v. Sunset Oaks, Inc., 649 P.2d 66 (Utah 1982).

There is no substantial evidence in the record which gives the trial court a basis for dividing the requested damages in half and awarding that amount to Fashion Place. Without substantial evidence in the record, the judgment for damages must be reversed.

ISSUE 6.

FASHION PLACE ACTED AS A BAILEE FOR THE ITEMS LEFT BY GLAD RAGS IN THE DEMISED PREMISES AND BREACHED ITS BAILMENT AGREEMENT BY LOSING CONTROL AND POSSESSION OF SAID ITEMS.

Shortly after Glad Rags vacated the demised premises, the parties entered into an agreement whereby Glad Rags was authorized to leave certain articles of personal property on the demised premises subject to 48 hours' notice by Fashion Place to remove said items (R. 388, 394). This established a bailment relationship between the parties and Fashion Place breached this relationship by failing to adequately and appropriately deal with the personal property after the alleged delivery of notice to remove.

The elements of a bailment are the intent to create a bailment, delivery of possession of the bailed items, and acceptance of those items by the bailee. The general requirements for a bailment are clearly laid out in Cugnini v. Rentals Cattle Co., 648 P.2d 159, 164 (Colo. App. 1981):

> . . .Bailment is the delivery of personal property by one person to another in trust for a specific purpose with a contract, expressed or implied, that the trust shall be faithfully executed and the property duly accounted for when the special purpose is accomplished. Simons v.

First National Bank, 30 Colo. App. 260, 491 P.2d 602 (1971).

The record establishes that a bailment was actually created between the parties when Fashion Place agreed to allow Glad Rags' personal property to remain on the premises.

The bailee has an obligation to exercise due care when holding property entrusted to him. The Utah Supreme Court has stated:

> . . .the Defendant as bailee has a duty to exercise reasonable care and caution commensurate with acceptance of the responsibility for safekeeping the property of others entrusted to him; and that if it is destroyed during bailment, a presumption arises that it is through his fault; and the burden is upon him to prove lack of fault.

Barlow Upholstery and Furniture v. Emmel, 533 P.2d 900, 901 (Utah 1975).

A factual dispute arises concerning the responsibility and return of said personal property by Fashion Place as bailee. Fashion Place claims it delivered notice to Glad Rags to remove the property (R. 451). Glad Rags claims it received no such notice (R. 54). Nevertheless, the resolution of this fact has no consequence to Fashion Place's duty as bailee:

> On the termination of the bailment, the bailor has the right to resume possession of the property, or, if the bailee continues in possession of the property, the bailor may treat the contract as continuing. If the bailee wishes to end his responsibility under the bailment

> terminable at will, he should restore the personalty to the bailor; . . ..

8 C.J.S. Bailments, Section 41(c).

Fashion Place had the obligation to either restore the items to Glad Rags or consider that the bailment was continuing. At a minimum, Fashion Place should have safely stored the bailed property on behalf of the Glad Rags with notice of the location, costs, and charges which would accrue. There is no evidence in the record to indicate that Fashion Place took any steps to care for Glad Rags' property either before or after the alleged termination of the bailment agreement. The Findings of Fact state that ". . .Defendant [Glad Rags] . . . never requested their return prior to the re-letting of the premises." (R. 281) The Conclusions of Law state the same language (R. 283). This is, however, the wrong standard, because the bailee is obligated to restore the bailed items to the bailor or consider the bailment as ongoing.

Because a bailment was established and Fashion Place did not fulfill its obligations under the bailment for the

safekeeping and return of the property, Glad Rags is entitled to recover damages based on the appraised value of the bailed items. See Winters v. Charles Anthony, Inc., 586 P.2d 453, 455 (Utah 1978).

The Findings and Conclusions state that the signs (items 1 and 2 on Exhibit 8) had no value, and that the light fixtures (items 12, 13, 14 and 15 on Exhibit 8) were property of Fashion Place under the Lease Agreement. Nevertheless, the other personal property (items 3-11 on Exhibit 8) was not mentioned in the Findings and Conclusions. There is evidence in the record concerning the value of these fixtures. The Findings and Conclusions make no mention of the bailment or the disposition of these items in light of Fashion Place's duty to care for the items. The trial court misapplied the law to the established facts and should therefore be reversed. Garcia v. Schwendiman, 645 P.2d 651 (Utah 1982).

ISSUE 7

THE TRIAL COURT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ALL MATERIAL ISSUES OF FACT AND THE JUDGMENT MUST BE SET ASIDE.

In Glad Rags' Counterclaim against Fashion Place, Glad Rags prays for the return of the security deposit held by

First Federal Savings & Loan Association in the amount of $2,267.00 (R. 59-63). The trial court made no findings or conclusions relating to the deposit. The deposit was an issue raised at the trial, especially in light of Glad Rags' allegations that Fashion Place agreed to return the deposit after Glad Rags had departed from the demised premises. (R. 389). Because the security deposit was set forth as a separate cause of action in Glad Rags' Counterclaim, the trial court was obligated to at least address this material issue and either award the deposit to Fashion Place, in reduction of the damages awarded, or award the security deposit to Glad Rags in its entirety.

Article 34 of the Lease Agreement, attached hereto as Appendix II, states in pertinent part:

> B. If any of the rents herein reserved or any other sum payable by tenant to landlord shall be overdue or unpaid. . .then landlord may, at its option and without prejudice to any other remedy which the landlord may have on account thereof, appropriate and apply said entire deposit or so much thereof as may be necessary to compensate landlord toward the payment of the rent or additional rent or loss or damage sustained by landlord to such breach on the part of tenant. . .

Fashion Place Lease, Article 34, p. 28 (Ex. 1). Because Fashion Place suffered no damages, the entire deposit should be returned to Glad Rags.

The Utah Supreme Court has stated that it is necessary for the trial court to make findings of fact and conclusions of law on all material issues presented in the case. In Romrell v. Zions First National Bank, 611 P.2d 392, 394 (Utah 1980), the Utah Supreme Court stated:

> In the instant case the trial court had the responsibility to make findings of fact and conclusions of law, notwithstanding the advisory verdict of a jury. Rule 52(a), U.R.C.P., states in part:
>
> > In all actions tried [on] the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately as conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A. . ..
>
> This requirement is mandatory and may not be waived. In re Murphy's Estate, 269 Minn. 393, 131 N.W.2d 220 (1964); 9 Wright & Miller, Federal Practice and Procedure: Civil Section 2335, 2574 (1971). Failure of the trial court to make findings on all material issues of fact is reversible error. Rucker v. Dalton, Utah, 598 P.2d 1336 (1979). See also, Sorenson v. Beers, 614 P.2d 160 (Utah 1980).

The trial court failed to make Findings of Fact and Conclusions of Law pertaining to all material issues

presented. Gald Rags' Counterclaim prays for the return of the security deposit, which issue is not addressed by the trial court. Because the Findings and Conclusions have failed to address this material issue, the trial court's ruling must be reserved.

POINT 8

GLAD RAGS IS ENTITLED TO RECOVER ATTORNEY'S FEES.

Fashion Place filed its action against Glad Rags on November 3, 1982. The filing of the Complaint (R. 2) occurred prior to the reletting of the demised premises to Fleet Foot and Life Uniforms. The Complaint seeks damages under the terms of the contract for unpaid rent during the vacancy period. It is clear from the Complaint that Fashion Place is proceeding under the terms of the lease to recover the unpaid rent balance it believes it is entitled to.

The Lease Agreement executed June 10, 1974, states:

Article 25.

ATTORNEYS' FEES.

> In the event that in any time during the term of this lease either the landlord or the tenant shall institute any action or proceeding against the other relating to the provisions of this lease, or any default hereunder, then, and in that event, the unsuccessful party in such action or proceeding agrees to reimburse the successful party for the reasonable attorney's fees and disbursements incurred therein by the successful party.

Fashion Place Lease, Article 25 (Ex. 1).

If this court reverses the decision of the trial court because the abandonment statute, Utah Code Ann. 78-36-12.3, is not applicable, and/or because Fashion Place is not entitled to recover damages under the terms of the common law or lease, this court should also award attorney's fees to Glad Rags under the above provision.

CONCLUSION

Fashion Place is not entitled to recover damages from Glad Rags under any theory. The Utah statute on abandonment, Utah Code Ann. 78-36-12.3, is not applicable because Glad Rags does not meet the factual requirements under that section and the statute is intended for a purpose distinct from this case. Fashion Place's use is the demised premises for its own benefit and to the exclusion of Glad Rags, by using the premises for Merchant Association meetings and storage of other tenants' property, constitutes an acceptance of the surrender of the Glad Rags' premises and terminates the lease. Fashion Place failed to mitigate its damages by requesting a rental of almost double the reserved rent in the Glad Rags lease, and requesting $20,000 from perspective tenants before they could occupy the premises. Fashion Place is not entitled to recover under the lease

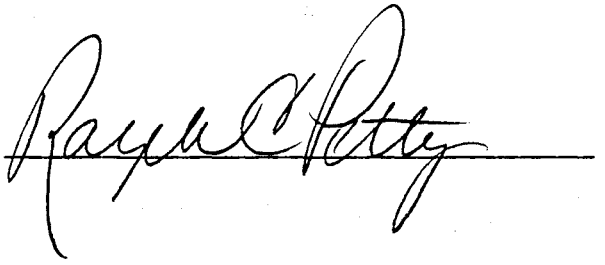
terms or the common law and may not be placed in a better position than if Glad Rags had not departed from the Fashion Place Mall. The court's award of one half of the damages prayed for by Fashion Place is unsubstantiated by the record and cannot be upheld. Fashion Place acted as a bailee for the personal property of Glad Rags left in the demised premises and breached that bailment agreement by losing possession and control of the bailed property and by failing to take adequate steps to deliver the property to Glad Rags. The trial court's ruling must be reversed because the trial court failed to make Findings of Fact and Conclusions of Law on all material issues of fact when no decision or ruling on the security deposit was made. Glad Rags requests that this court reverse the ruling of the trial court and award attorney's fees under the terms of the lease agreement.

Respectfully submitted this 24th day of May, 1985.

Ralph C. Petty

MAILING CERTIFICATE

I hereby certify that I mailed four true and accurate copies of the foregoing Brief of Appellant to Raymond Scott Berry, Green, Higgins & Berry, 900 Newhouse Bldg., 10 Exchange Place, Salt Lake City, Utah 84111, this 24th day of May, 1985.



APPENDIX I

LEASE PROVISIONS CONCERNING DEFAULTS BY TENANT

Article 22.

DEFAULT BY TENANT.

Should the Tenant at any time be in default hereunder with respect to any rental payments or other charges payable by the Tenant hereunder . . . or should the tenant vacate or abandon the premises, then the Landlord may treat the occurrence of any one or more of the foregoing events as a breach of this Lease, and in addition to any or all other rights or remedies of the Landlord hereunder and by the law provided, it shall be, at the option of the Landlord, without further notice or demand of any kind to Tenant or any other person:

(a) The right of the Landlord to declare the term ended and to re-enter the premises and take possession thereof and remove all persons therefrom, and the Tenant shall have no further claim thereon or thereunder; or

(b) The right of the Landlord without declaring this Lease ended to re-enter the premises and occupy or lease the whole or any part thereof for and on account of the Tenant and upon such terms and conditions and for such rent as the Landlord may deem proper and to collect said rent and any other rent that may thereafter become payble and apply the same toward the amount due or thereafter to become due from the Tenant and on account of such expenses of such subletting and any other damages sustained by the Landlord; and should such rental be less than that herein agreed to be paid by the Tenant, the Tenant agrees to pay such deficiency to the Landlord in advance on the payment of minimum annual rental and to pay to the Landlord forthwith upon any such reletting the costs and expenses the Landlord may incur by reason thereof; or

(c) The right of the Landlord even though it may have relet the premises, to thereafter elect to terminate this Lease and all of the rights of the Tenant in or to the premises.

Should the Landlord have relet the premises under the provisions of subparagraph (b) above, it may execute any such lease either in its own name

or in the name of the Tenant as it shall see fit but the tenant therein named shall be under no obligation whatsoever to see to the application by Landlord of any rent collected by the Landlord from such tenant, nor shall the Tenant hereunder have any right or authority whatever to collect any rent from such tenant. The Landlord shall not be deemed to have terminated this Lease, or the liability of the Tenant to pay rent thereafter to accrue, or its liability for damages under any of the provisions hereof, by any such re-entry or by any action in unlawful detainer, or otherwise, to obtain possession of the premises, unless the Landlord shall have notified the tenantin writing that it has so elected to terminate this Lease, and the Tenant further covenants that the service by the Landlord of any notice pursuant to the unlawful detainer statutes of the State of Utah and the surrender of possession pursuant to such notice shall not (unless the Landlord elects to the contrary at the time of or at any time subsequent to the serving of such notices and such election be evidenced by a written notice to the Tenant) be deemed to be a termination of this Lease. Nothing herein contained shall be construed as obligating the Landlord to relet the whole or any part of the premises. In the event of any entry or taking possession of the premises as aforesaid, the Landlord shall have the right, but not the obligation, to remove therefrom all or any part of the personal property located therein and may place the samein storage at a public warehouse at the expense and risk of the owner thereof

. . .

Should the Landlord elect to terminate this Lease under the provisions of subparagraphs (a) or (c) above, the Landlord shall thereupon, without waiting for the end of the term hereof, be entitled to recover from the Tenant as damages the difference, if any, between the then reasonable rental value of the premises for the period of the term reserved in the Lease and the amount of rental and other charges payable by the Tenant for the balance of the term of this Lease, together with the rent then unpaid if any.

. . .

The remedies given to the Landlord in this Article shall be in addition and supplemental to

all other rights or remedies which the Landlord may have under the laws then in force.

The waiver by Landlord of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by Landlord shall not be deemed to be a waiver of any preceeding breach by tenant of any term covenant or condition of this Lease, other than the failure of Tenant to pay the particular rental so accepted, regardless of Landlord's knowledge of such preceeding breach at the time of acceptance of such rent. No covenant, term or condition of this Lease shall be deemed to have been waived by Landlord unless such waiver be in writing by Landlord.

APPENDIX II

SECURITY DEPOSIT

Article 34.

A. Tenant has deposited with Landlord the sum specified in Article 1 hereof as "Security Deposit" receipt of which is hereby acknowledged. Said deposit shall be held by Landlord without liability for interest as secuirty for the faithful performance by Tenant of all the terms of this Lease by said Tenant to be observed and performed. The security deposit shall not be mortgaged, assigned, transferred or encumbered by Tenant without the written consent of Landlord and any such act on the part of Tenant shall be without force and effect and shall not be binding upon Landlord.

B. If any of the rents herein reserved or any other sum payable by Tenant to Landlord shall be overdue andunpaid or should Landlord make payments on behalf of the Tenant, or Tenant shall fail to perform any of the terms of this Lease, then Landlord may, at its option and without prejudice to any other remedy which Landlord may have on account thereof, appropriate and apply said entire deposit or so much thereof as may be necessary to compensate Landlord toward teh payment of rent or additional rent or loss or damage sustained by Landlord due to such breach on the part of Tenant; and Tenant shall forthwith upon demand restore said security to the original sum deposited. Should Tenant comply with all of said terms and promptly pay all of the rentals as they fall due and all other sums payable by Tenant to Landlord, said deposit shall be returned in full to Tenant at the end of the term.

C. In the event of bankruptcy or other debtor-creditor proceedings against Tenant, such security deposit shall be deemed to be applied first to the payment of rent and other charges due Landlord for all periods prior to the filing of such proceedings.

D. Landlord may deliver the funds deposited hereunder by Tenant to the purchase of Landlor's interest in the premises in the event that such interest be sold and thereupon Landlord shall be discharged from any further liability with respect to such deposit, and this provision shall also apply to any subsequent transferees.

E. Anything to the contrary nowithstanding containedin Article 34, Tenant may deposit the sum of Two Thousand Two

Hundred Sixty Seven Dollars in an account with a federally insured savings and loan association in lieu of depositing said amount with the Landlord, provided, however, Tenant shall execute in favor of Landlord as assignment form, in the form set forth on the attached Exhibit "G", wherein Tenant assigns and sets over to Landlord all right, title and interest in and to said account. Tenant shall deposit said amount, execute the assignment form and cause it to be accepted in writing by the savings and loan association at the time of execution of the Lease by Landlord. Landlord shall hold teh savings account passbook and assignment as a security deposit under the terms and conditions set forth in Article 34. All interest or earnings accruing from said account shall be paid directly to the Tenant by the savings and loan association.